

This letter *Donahue* No. A-15-024 SUPERSEDES the two *Yang* advice letters Nos. A-95-070 and A-95-070(a) that state otherwise.

February 26, 2015

Scott Donahue  
Councilmember  
City of Emeryville  
1420 45th Street, Studio 49  
Emeryville, CA 94608

Re: Your Request for Advice  
**Our File No. A-15-024**

Dear Mr. Donahue:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Government Code Section 1090. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTION

You are a member of an artists’ limited-equity housing cooperative (the “Co-op”) that owns the real property on which your unit is located. As a city council member, may you participate in decisions regarding a large development project located approximately 237 feet from your unit?

### CONCLUSION

Yes. There will be no reasonably foreseeable financial effects on any of your economic interests.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## FACTS

You are a city council member for the city of Emeryville, a small city spanning 1.2 square miles with a population of about 11,000. You have a residence and studio in the Co-op which, under California law, is a “limited-equity cooperative” organized as a nonprofit corporation in which the residents own shares. According to the corporation’s bylaws, members who wish to sell their shares may only do so to the corporation, and the price is limited to the amount paid in the purchase of their shares, simple interest on that price, and the replacement value of any improvements. You purchased your shares for \$2,000.

A large development project has been proposed on eight acres as a planned unit development. The property, known as the Sherwin-Williams site, was owned and operated as a paint factory by the Sherman Williams Company since the early 1900s. Sherwin Williams ceased operations in 2006, and a site remediation has been completed in accordance with state environmental laws. The property will be redeveloped into a mixed-use “town center” with a combination of residential and commercial uses organized around a central green park.

Your unit is located approximately 237 feet from the nearest boundary of the proposed project.

## ANALYSIS AND CONCLUSIONS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest.<sup>2</sup> A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable<sup>3</sup> that the decision will have a material financial effect on one or more of the public official’s interests as set forth in Section 87103.

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- Real property in which he or she has a direct or indirect interest of \$ 2,000 or more. (Section 87103(b), Regulation 18703.2.)

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<sup>2</sup> When a public official who holds an office specified in Section 87200 (including city attorneys) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the interest as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

<sup>3</sup> A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.

- A source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- A source of gifts to him or her if the gifts aggregate to \$ 420 or more within 12 months prior to the decision. (Section 87103(e).)
- The official's personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule. (Section 87103.)

Your question implicates affects on real property and personal finances interest.

## **Real Property**

Section 82033 defines "interest in real property" to include "any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more. Interests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10-percent interest or greater."

You indicate that the Co-op is organized as a nonprofit corporation that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. The corporation owns the real property in which Co-op members reside and work. Members purchase shares of the corporation from the corporation which shares give them the right to occupy a particular unit. When selling their shares, the members must re-sell to the corporation. Title to the land and building is held by the corporation.

We first address the question of whether your interest in the Co-Op is real property. In making this determination, we have considered prior letters in which we addressed similar interests in country club memberships. In the *Greenwell* Advice Letter, No. A-97-543, we said that the officials did not have an interest in the country club's property within the meaning of Section 87103(b) because the value of the membership was not related to increases or decreases in the assets of the club or the value of the land upon which it was located.

In *Doering* (Advice Letter No. A-12-068) we found that a proprietary membership in a country club, which was a nonprofit corporation registered as a 501(c)(7) non-profit mutual benefit organization, *was* real property. We said that the proprietary members had an equitable right of ownership to the club's real and personal property because they were entitled to a proportionate share of the value of the assets if the club were to be dissolved. *Doering* also said "... it is clear that, particularly when the resale value of a club membership is determined at least in part by the value of the club's real estate, the members have at least a beneficial interest in that real estate."

Applying these cases to your facts, it is clear that your interest is not an interest in real property, but rather, an interest in the shares of the corporation. Because the value of your shares is not related to increases or decreases in the assets of the corporation or the value of the land upon which your unit is located and, upon dissolution, members do not receive a share of the corporation's assets,<sup>4</sup> your shares do not constitute real property.<sup>5</sup>

## **Personal Finances**

Under Regulation 18703.5, a public official has an economic interest in his or her personal finances and those of his or her immediate family. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.

Decisions to redevelop the nearby property would likely have an effect on the corporation and its property, but these decisions are not likely to affect your personal expenses, income, assets or liabilities. Because the resell price of your shares is fixed in the bylaws, any changes in the value of the corporation's real property will have no effect on your asset (the shares).

Accordingly, you are not prohibited from participating in the subject decisions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

John W. Wallace  
Assistant General Counsel

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl

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<sup>4</sup> Under Regulation 1.501(c)(3) of the Internal Revenue Code, the assets of a 501(c)(3) corporation can only be distributed to another 501(c)(3) corporation or certain government agencies.

<sup>5</sup> This letter Supersedes the two *Yang* advice letters (Nos. A-95-070 and A-95-070a) that state otherwise.